

EX PARTE OR LATE FILED

Wiley, Rein & Fielding

1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

ORIGINAL

Jeffrey S. Linder
(202) 719-7384
jlinder@wrf.com

Fax: (202) 719-7049
www.wrf.com

February 9, 1999

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
455 Twelfth Street, S.W.
Room TW-A325
Washington, D.C. 20554

RECEIVED

FEB - 9 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

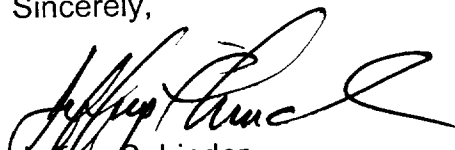
Re: *Ex Parte* Submission in CC Docket No. 98-147

Dear Ms. Salas:

I am attaching two copies of a written ex parte communication in the above-captioned proceeding. The ex parte consists of a letter from John Raposa, Associate General Counsel – Federal Regulatory Matters, of GTE Service Corporation to Chairman Kennard. Copies also were provided to Commissioner Harold Furchtgott-Roth, Commissioner Susan Ness, Commissioner Michael Powell, and Commissioner Gloria Tristani.

Please contact me if you have any questions.

Sincerely,


Jeffrey S. Linder

No. of Copies rec'd 01
List ABCDE

John F. Paposa
Associate General Counsel -
Federal Regulatory Matters



GTE Service Corporation
600 Hidden Ridge, HQE03J27
P.O. 152092
Irving, TX 75015-2092
972/718-6969
FAX: 972/718-1250
john.paposa@telops.gte.com

February 9, 1999

By Hand Delivery

RECEIVED

The Honorable William E. Kennard
Chairman, Federal Communications Commission
The Portals
455 Twelfth Street, S.W.
Room 8-B201
Washington, D.C. 20554

FEB - 9 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Subject: Written Ex Parte Communication of GTE Service Corporation,
Deployment of Wireline Services Offering Advanced
Telecommunications Capability, CC Docket No. 98-147**

Dear Chairman Kennard:

On January 25, 1999, the United States Supreme Court held that the Commission's Rule 319,¹ governing the obligations of incumbent local exchange carriers (ILECs) to unbundle network elements for competitors, is unlawful and contrary to the Communications Act.² The Supreme Court's decision clearly compels an immediate re-evaluation of the agency's conclusions and proposals set forth in its Advanced Services proceeding.³ The record in that docket amply demonstrates the widespread availability of equipment used to provide new data services. In fact, there are currently more than 130 suppliers of hardware for asymmetric digital subscriber line services (ADSL)⁴ – one of several varieties of high-speed data services. Accordingly, there is no basis for believing, let alone, finding, that such equipment is "necessary" for competitive local exchange carriers (CLECs) to compete, or that the lack of unbundling by ILECs would "impair" the ability of CLECs to provide advanced telecommunications services. And, just as clearly, an overbroad unbundling requirement would impose social costs that outweigh the benefits it would confer upon specific competitors. As Justice Breyer stated in his concurring opinion, "[r]egulatory rules that go too far, expanding the definition of what must be shared beyond that which is essential to

¹ 47 C.F.R. § 51.319.

² *AT&T Corp. v. Iowa Utilities Board*, Nos. 97-286, etc., 1999 WL 24568 (U.S. Jan. 25, 1999) ("AT&T").

³ Petition of Bell Atlantic Corporation For Relief from Barriers To Deployment of Advanced Telecommunications Services, et al., CC Docket Nos. 98-11, 98-26, 98-32, 98-78, 98-91; CCB/CPD No. 98-15, RM 9244, *Memorandum Opinion and Order*, FCC 98-188 ("Advanced Services MO&O"); Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, *Notice of Proposed Rulemaking* ("Advanced Services NPRM") (rel. Aug. 7, 1998).

⁴ A list of ADSL vendors – equipment manufacturers, service providers, consultants, etc. – is available at <http://adsl.com/adsl_vendors.html>.

that which merely proves advantageous to a single competitor, risk costs that, in terms of the Act's objectives, may make the game not worth the candle."⁵

In the *Advanced Services MO&O*, the Commission concluded that "all equipment and facilities used in the provision of advanced services are 'network elements' subject to the obligations in Section 251(c) of the 1996 Act."⁶ According to the Commission, this obligation requires ILECs to provide new entrants with unbundled loops capable of transporting high-speed digital signals and, to the extent technically feasible, unbundled access to the equipment used in the provision of advanced services.⁷ The *Advanced Services NPRM* asked parties to identify the specific network elements that ILECs should be required to unbundle as well as to discuss the applicability of Section 251(d)(2) of the 1996 Act.⁸

The Supreme Court's recent ruling has left the Commission with limited discretion in identifying those network elements that must be offered on an unbundled basis. The Court vacated in its entirety Section 51.319 of the Commission's rules, which requires ILECs to provide requesting carriers with blanket access to a minimum of seven unbundled network elements. In rejecting that rule, the Court held that the Commission had failed to implement properly Section 251(d)(2), which requires the agency to differentiate between those unbundled network elements that competitors truly need from the incumbents and those that they can reasonably obtain on their own.⁹ The Court concluded that "blanket access" to the incumbents' networks was not the intent of Congress:

[I]f Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) in the statute at all. It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided.¹⁰

⁵ *AT&T*, 1999 WL 24568, at *31 (Breyer, J. concurring) (emphasis added).

⁶ *Advanced Services MO&O*, ¶ 57 (emphasis added).

⁷ *Id.*, ¶¶ 11, 18 (emphasis added).

⁸ *Advanced Services NPRM*, ¶ 180. Section 251(d)(2) mandates that, in determining the network elements that should be made available to requesting carriers, the Commission "shall consider, at a minimum, whether – (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2).

⁹ It may very well be that proper application of the standard in Section 251(d)(2) will require incumbents to provide unbundled access to network elements in certain geographic regions but not others.

¹⁰ *AT&T*, 1999 WL 24568, at *9.

Thus, the Commission's authority to require an incumbent to offer network elements on an unbundled basis is limited. As such, any test adopted by the Commission to implement Section 251(d)(2) must be a narrow one.

The Court's prohibition on unfettered access to an incumbent's network applies with equal force to the provision of advanced services. When determining what network elements must be unbundled to allow competitors to provide advanced services, the Commission must apply the "necessary" and "impair" standards "on a rational basis."¹¹ Moreover, the Act "requires a convincing explanation of why facilities should be shared (or 'unbundled') where a new entrant could compete effectively without the facility, or where practical alternatives to that facility are available."¹² The availability of alternatives is an absolutely *critical* component in the Commission's determination of the network equipment that an incumbent must unbundle to allow competing carriers to provide advanced services.

In addition, the Commission cannot overlook the real and substantial costs that excessive unbundling obligations would impose on the public. Saddling ILECs with the additional duty to unbundle equipment used to offer advanced services would assuredly diminish incentives to invest and innovate. Commissioner Powell recently expressed this sentiment in the *Section 706 NOI* proceeding. The Commissioner warned of the all-too-real dangers posed by overly broad access requirements:

[R]equiring certain firms to provide access to their facilities or services to other firms or even to end users may have some unfavorable consequences. In particular, I think we should search for alternative solutions to encourage innovation and competition in the provision of 'last mile' transmission to homes and businesses. While mandating access can bring about short-term improvements in retail competition, it may also undermine incentives for developing new methods to circumvent the influence of incumbents over distribution.¹³

To avoid a chilling effect on innovation by both ILECs and their competitors, the Commission must avoid unreasonable unbundling requirements.¹⁴

¹¹ *Id.* at *10.

¹² *Id.* at *31 (Breyer, J. concurring).

¹³ Separate Statement of Commissioner Michael K. Powell, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, CC Docket No. 98-146 (Jan. 28, 1999).

¹⁴ The deleterious effect on innovation is discussed in the *ex parte* submission of G. Mitchell Wilk and Carl R. Danner, Promoting Advanced Services and Local Competition: A Better Approach to Section 706, in the *Advanced Services NPRM* on Nov. 6, 1998, at 7-11. Indeed, AT&T's Chairman and CEO, C. Michael Armstrong, has been most eloquent on this point: "No company will invest billions of dollars to become a facilities-based broadband services provider if competitors who have not invested a penny of capital, nor taken an ounce of risk, can come along and get a free ride on the investments and risks of others."

As Commissioner Powell stated in the January 28, 1999, FCC open meeting, the task facing the Commission in reviewing the unbundling rules in the local competition proceeding is "not trivial." Nor is this task trivial in the Advanced Services rulemaking. The Commission's duty is clear. When determining what network elements must be unbundled to allow competitors to provide advanced services, the agency is obliged to consider the availability of alternative sources of network elements. As the Court proclaimed, "[t]he Commission cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network."¹⁵ Moreover, the Commission cannot justify requiring the unbundling of network elements based on the fact that a competitor's costs may increase or service quality may decrease if the element is provided by a source other than the incumbent. The Court expressly rejected that logic in *AT&T*.¹⁶

In its opening comments in the Advanced Services proceeding, GTE demonstrated that the equipment needed to enable a copper loop to transmit advanced services (e.g., digital subscriber line access multiplexers – DSLAMs) does not satisfy the statutory criteria for unbundled access under Section 251(d)(2).¹⁷ GTE explained that the "necessary" and "impair" standards had not been met, because the electronics needed to offer advanced services could be obtained through a variety of sources other than the incumbent.¹⁸ Accordingly, GTE and a number of other parties objected to the Commission's unbundling requirements as overbroad.

In addition, GTE has demonstrated throughout the Advanced Services rulemaking and the related Notice of Inquiry proceeding¹⁹ that carriers are competing effectively in the advanced services marketplace on a variety of fronts.²⁰ This fact is confirmed in the Commission's recent report assessing the availability of advanced telecommunications capability to all Americans. The Report concludes that "broadband is being deployed in a reasonable and timely fashion," and acknowledges that "large investments in broadband technology" are being made in virtually all segments of the telecommunications industry.²¹ Indeed, CLECs

¹⁵ *AT&T*, 1999 WL 24568, at *9.

¹⁶ The Court rejected the Commission's determination that an increase in cost or a decrease in service quality constitutes "impairment" under Section 251(d)(2). *Id.* at *10.

¹⁷ GTE Comments at 103, CC Docket No. 98-147 (filed Sept. 25, 1998).

¹⁸ *Id.* at 103-104.

¹⁹ Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, *Notice of inquiry*, FCC 98-187 (rel. Aug. 7, 1998) ("*Section 706 NOI*").

²⁰ GTE Comments on *Advanced Services NPRM*, CC Docket No. 98-147, at 79 (filed Sept. 25, 1998); GTE Comments on *section 706 NOI*, CC Docket No. 98-146, at 9 (filed Sept. 14, 1998).

²¹ FCC Issues Report on the Deployment of Advanced Telecommunications Capability to All Americans, CC Docket No. 98-146, Report No. CC 99-1(Press Release) (Jan. 28, 1999).

have raised between \$15-20 billion dollars in capital, primarily for infrastructure investment in ATM, frame relay, and xDSL technologies.²² These competitive carriers are not only attracting substantial investment dollars but also using these resources to aggressively deploy advanced services. As the Association of Local Telecommunications Services recently announced:

CLECs were the first to introduce fiber ring networks and synchronous optical network ("SONET") based services, and are at the forefront in deploying new digital subscriber line ("xDSL") technologies. . . . CLECs have risked enormous amounts of capital, and supported CLEC efforts to deploy these advanced services in hundreds of markets in only a few years' time.²³

The CLECs' success in offering advanced services has been well publicized. One such CLEC, Covad Communications (Covad), has made significant strides. For example, Covad recently announced plans to build networks capable of serving more than 28 million homes in 22 of the top 50 metropolitan statistical areas (MSAs).²⁴ Moreover, Covad has installed over 4,000 DSL lines and has received orders for its advanced services from approximately 100 ISP and enterprise customers, including Apple Computer, Cisco Systems, Intel, Oracle Corporation, and Stanford University.²⁵ Clearly, CLECs are effective competitors in the provision of advanced services.

The rapidly expanding market for advanced services is further bolstered by the wide-spread availability of equipment used to provide advanced service capabilities. As mentioned above, there are more than 130 manufacturers of ADSL hardware. DSLAMs, modems, and other advanced services electronics are readily available in the marketplace from sources other than the incumbent; and ILECs enjoy no special advantage, due to their size or incumbency, in procuring such equipment. Rather, CLECs are taking full advantage of these options by purchasing equipment from a variety of suppliers. For example:

²² ALTS Comments on *Section 706 NOI*, CC Docket No. 98-146, at 9 (filed Sept. 14, 1998).

²³ Petition of the Association for Local Telecommunications Services for a Declaratory Ruling Establishing Conditions Necessary To Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-78, at 4 (filed May 4, 1998).

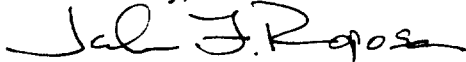
²⁴ Amendment No. 3 to Form S-1 Registration Statement, Covad Communications Group (filed Jan. 19, 1999) (available at <http://www.covad.com/InvestorRelations/IRdocuments.html>).

²⁵ *Id.*

- Covad purchases DSL hardware from FlowPoint Corporation.²⁶
- NEXTLINK is the preferred provider to Covad for local transport and collocation services.²⁷
- Cisco is the primary supplier of DSL technology for Sprint. Sprint's Broadband Local Networks unit will soon begin widely deploying Cisco DSLAMs.²⁸
- Promatry Communications has introduced a new access system that combines the functionality of a DSLAM with an asynchronous transfer mode switch.²⁹

GTE submits that the Commission is precluded from imposing expansive unbundling obligations on incumbents. The reality of the marketplace is that there are a variety of sources from which competing carriers can obtain equipment to offer advanced services. Moreover, excessive unbundling requirements impose significant social costs that threaten to derail the continued deployment of advanced services. The Supreme Court's decision in *AT&T* clearly compels the Commission to reverse its determination that incumbents must provide competing carriers with access to all equipment (e.g., DSLAMs and other non-bottleneck electronics) used to provide advanced services on an unbundled basis.

Sincerely,



John F. Raposa
Associate General Counsel -
Federal Regulatory Matters

cc: Commissioner Harold Furchtgott-Roth
Commissioner Susan Ness
Commissioner Michael Powell
Commissioner Gloria Trisani
Secretary, Federal Communications Commission (two copies)

²⁶ Berinato & Carmen Nobel, "CLECs alleviate bandwidth woes," PC Week Online (April 13, 1998) (available at <http://www.zdnet.com/pcweek/news/0143/13clec.html>).

²⁷ "NEXTLINK Communications Announces Strategic Agreement With Covad Communications Group," Press Release, January 5, 1999.

²⁸ "Sprint Selects Cisco To Provide Digital Subscriber Line Solutions for Broadband Deployments," Press Release, January 26, 1999.

²⁹ "A switch or mux?" Telephony, January 25, 1999.